STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 5, 2003
V	No. 245223 Bay Circuit Court
EDWARD M. CZUPRYNSKI, Defendant-Appellee.	LC No. 02-001127-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendant's motion to suppress evidence seized during a search of defendant's law office. We affirm.

I. Facts and Proceedings

The instant appeal arises from a search of defendant's law office on May 10, 2001. On May 9, 2001, Detective Melvin Mathews, a state police officer assigned to BAYANET (Bay Area Narcotics Enforcement Team), was directed by his supervisor to contact Valerie Furrer, then defendant's secretary, to obtain information from her as to whether she had knowledge of defendant's alleged involvement in illegal activity. When Detective Mathews interviewed Furrer at her home later that evening, Matthews asked Furrer whether she was having difficulties with a prominent Bay City businessperson. Furrer told him that defendant, a Bay City attorney, was a verbally abusive boss who belittled her. Detective Mathews then inquired whether defendant engaged in any illegal behavior, and Furrer told him that she regularly saw marijuana in defendant's private office[1] and that, earlier that day, she saw an estimated few ounces of marijuana and marijuana smoking pipes on his desk. Detective Mathews asked Furrer to enter defendant's office the next morning, confirm the presence of marijuana in defendant's office, and call him to report her findings.

[1] The record shows that defendant did not permit Furrer to enter his office without his permission and that she signed an agreement to that effect when she started working for defendant. Despite that agreement, Furrer said, she occasionally entered defendant's office to complete work-related tasks, such as retrieving defendant's calendar or client information.

After speaking with Furrer, Detective Mathews contacted prosecutor Jeff Day, relayed to him the information he received from Furrer, and then went to the prosecutor's office to begin drafting a search warrant. Mathews testified at defendant's preliminary examination that "[t]o verify [the] information [Furrer provided] and before we were even going to finish drafting the search warrant, Miss Furrer was suppose[d] to call me at 9:30 when she returned to work in [defendant's] office."

The next morning around 9:00 a.m., Detective Mathews paged Furrer to "make sure things were still going down the way they were suppose[d] to go down." Furrer called Detective Mathews at 9:25 a.m. and informed him that she entered defendant's office that morning and saw marijuana on defendant's desk. Detective Mathews testified that after receiving the information from Furrer, he contacted the prosecutor and "that's when everything started rolling." Detective Mathews and an assistant prosecutor then completed the search warrant and affidavit in support of the search warrant for defendant's suite of offices in Bay City. In his affidavit, Detective Mathews stated in part:

> Today, May 10, 2001, Ms. Furrer called me and told me she had looked in [defendant's] office today and saw two marijuana cigarettes in a box on the desk. She also saw what she estimates to [be] four or five ounces of marijuana in a plastic baggie sitting on a table in [defendant's] office.

At 3:42 p.m., a district court judge signed the search warrant. Detective Mathews, Lieutenant Card, and other BAYANET officers executed the search warrant later that afternoon and during the search seized marijuana, money, and other items discovered in defendant's offices and a suite across the hall being rented by another tenant. Defendant was initially charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). After evidence of the marijuana seized from the suite across the hall from defendant's office was suppressed, the prosecution amended its complaint to add a charge of possession of marijuana, MCL 333.6403(2)(d). Defendant was bound over to circuit court on this charge after waiving his preliminary examination.

Defendant thereafter filed a motion to suppress the evidence found in his office, arguing that Furrer acted as an agent for the police when she searched his office on the morning of May 10, 2001, and, therefore, the police obtained the evidence against him as a result of a warrantless search.[2] After filing the motion, defendant took Detective Mathews' deposition in the related forfeiture matter[3] and questioned Detective Mathews concerning his conversations with Furrer.[4] The trial court then heard oral arguments on defendant's motion, received additional testimony

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[2] Defendant also filed motions (1) to dismiss the complaint on the basis of selective enforcement; (2) to dismiss based on delay causing prejudice; and (3) to quash the information because of the prosecution's attempt to enhance his sentence to a second offense based on a twenty-eight-year old misdemeanor conviction of possession of marijuana. The trial court denied these motions, and defendant has not appealed the trial court's decisions.

[3] *In re $14,053*, Bay Circuit Court No. 01-3823-CF.

[4] While the transcript of the deposition does not so specify, during oral arguments in this Court, appellant's counsel stated that this deposition was "performed live before Judge Clulo."

from Furrer on July 10, 2002, and was provided copies of the transcripts of Detective Mathews' deposition testimony and the preliminary examination.

In a written opinion, the circuit court concluded that defendant had an expectation of privacy in his office, and that Furrer acted as an agent for the government when she entered defendant's office on May 10, 2001. The trial court further concluded that, excluding the references to Furrer's findings on May 10, 2001, the affidavit contained other facts which independently were sufficient to establish probable cause to issue the search warrant, but that nevertheless, the illegal search by Furrer affected or motivated the decision to seek the search warrant. Because it concluded that the illegal search was inexorably intertwined with the decision to obtain the warrant, the trial court suppressed the evidence found in defendant's office. We granted plaintiff's application for leave to appeal.

II. Standard of Review

We review for clear error the trial court's findings of fact at a suppression hearing[5]. *People v Wilson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 232495, issued 7/1/03) slip op at 6. "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002) (citation omitted). The trial court's ultimate decision on a motion to suppress is reviewed de novo. *Id.*

III. Analysis

On appeal, plaintiff asserts that the trial court clearly erred in its finding that the illegal search by Furrer was inexorably entwined with the decision to seek the search warrant, and that the illegal search affected or motivated the decision to seek the warrant. We disagree.

The Michigan and federal constitutions protect individuals from unreasonable searches and seizures. *Wilson, supra* at 7, citing *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996); US Const, Am IV; Const 1963, art 1, § 11. The court must exclude evidence seized as a result of an unconstitutional search unless an exception to the exclusionary rule applies. *Wilson, supra* at 7, citing *People v Stevens (After Remand)*, 460 Mich 626, 634; 597 NW2d 53 (1999).

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[5] Relying on In *People v Zahn*, 234 Mich App 438, 445-446; 594 NW2d 120 (1999), plaintiff asserts that our review should be de novo. In *Zahn*, this Court stated that when the trial court's findings are derived from transcripts submitted by the parties, there is no reason to give special deference to these findings because the trial court is in no better position than this Court to assess the evidence. We decline plaintiff's invitation to apply the statement by this Court in *Zahn* to the facts of this case. First, this statement does not reflect the holding of *Zahn*, and thus, constitutes dicta which we are not bound to follow. *Faith Reformed Church of Traverse City, Michigan v Thompson*, 248 Mich App 487, 496; 639 NW2d 831 (2001). Second, as we noted above, according to appellant's counsel, the trial court apparently did observe the deposition of Detective Mathews which was taken in the forfeiture proceeding. On the facts, then, this case is distinguishable from *Zahn* insofar as the trial court had an opportunity to make credibility determinations, based on his observations of the witness, that this Court is not similarly positioned to make.

In *Murray v United States*, 487 US 533; 108 S Ct 2529; 101 L Ed 2d 472 (1988), the United States Supreme Court held that evidence need not be excluded if the prosecution proves that the government obtained the evidence through a source "genuinely independent" of the preceding unconstitutional search and seizure. In determining whether the source of the evidence was independent of the illegal search, the court should evaluate (1) whether the illegal search affected the officers' decision to seek a warrant and (2) whether the information gained from the illegal search was presented to the issuing magistrate and affected the magistrate's decision to issue the warrant. *People v Smith*, 191 Mich App 644, 649-650; 478 NW2d 741 (1991), citing *Murray, supra* at 542. The government's burden of proving that the independent source doctrine applies is "much more onerous" than the burden of persuading a magistrate that probable cause exists to issue a warrant. *Murray, supra* at 539-540. If the reviewing court answers either inquiry in the affirmative, the court must conclude that the source of the evidence was not independent of the illegal search and, therefore, must exclude the evidence[6]. *Smith, supra* at 650, citing *Murray, supra* at 542.

The trial court found that although Detective Mathews began drafting the search warrant with the prosecutor on May 9, 2001, Furrer's search on May 10, 2001 affected and motivated the decision to seek the search warrant. Plaintiff fails to show that this finding was clearly erroneous. Detective Mathews testified at the preliminary examination that "[t]o verify th[e] information [received from Furrer on May 9] *and before we were even going to finish drafting the search warrant*, Miss Furrer was suppose[d] to call me" the next morning after searching defendant's office. (Emphasis added.) Detective Mathews also testified that he paged Furrer on the morning of May 10 "to make sure things were still going down the way they were suppose[d] to go down" and that "everything started rolling" after Furrer called him. Because the illegal search by Furrer affected the officer's decision to seek the warrant, the trial court was required to exclude the evidence. *Smith, supra* at 649-650.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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[6] Plaintiff asserts that the trial court improperly applied *Murray* here because, as the trial court found, the affidavit was sufficient to establish probable cause to issue the search warrant even if the information from the illegal search was purged. Plaintiff cites no authority to support this argument, and we will not search for authority to support it. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2003). More importantly, the trial court did not "explicitly find that the agents would have sought a warrant if they had not [conducted the illegal search]," *Murray, supra* at 543, but instead found that the illegal search was "inexorably intertwined" with obtaining the warrant. Thus, we conclude that plaintiff's argument lacks merit.